No. 87-1207

(3)

Supreme Court, U.S.
FILED
JUN 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

RAY WILL,

*Petitioner*,

—v.—

MICHIGAN DEPARTMENT OF STATE POLICE and DIRECTOR OF STATE POLICE,

*Respondents*.

ON WRIT OF *CERTIORARI* TO THE MICHIGAN SUPREME COURT

## JOINT APPENDIX

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PETITION FOR *CERTIORARI* FILED JANUARY 11, 1988
*CERTIORARI* GRANTED APRIL 18, 1988

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**MICHIGAN COURT OF CLAIMS**

**CASE NUMBER 6667**

Plaintiff

Ray Eugene Will

Attorney

Mr. Lawrence J. Emery
REID AND REID, P.C.
530 South Capitol
Lansing, MI 48933

Defendant

THE STATE OF MICHIGAN and Department of Civil Service, Michigan Department of State Police, State Personnel Director, Director of Michigan State Police

Attorney

For Department of Civil Service and State Personnel Director Mr. Robert S. Welliver
For State Police—See back

THE HONORABLE Thomas L. Brown

| Date | Proceedings |
|---|---|
| **1978** | |
| Nov. 10 | COMPLAINT filed. Copies sent to Mr. Krasicky and Department of Civil Service and Department of State Police. |
| Nov. 10 | MOTION FOR CONSOLIDATION filed by Plaintiff. |
| Dec. 5 | APPEARANCE and NOTICE (of Robert S. Welliver, Assistant Attorney General, as Attorney for Defendants Department of Civil Service and State Personnel Director) filed. |

Dec. 5 ANSWER TO MOTION FOR CONSOLIDATION filed by Defendants Department of Civil Service and State Personnel Director.

Dec. 5 MOTION FOR SUMMARY AND/OR ACCELERATED JUDGMENT, MEMORANDUM OF LAW IN SUPPORT OF MOTIONS OF DEFENDANTS DEPARTMENT OF CIVIL SERVICE AND STATE PERSONNEL DIRECTOR, NOTICE OF HEARING and PROOF OF SERVICE filed by Defendants Department of Civil Service and State Personnel Director.

Dec. 6 MOTION FOR SUMMARY JUDGMENT AND ACCELERATED JUDGMENT, MEMORANDUM OF LAW, NOTICE OF HEARING and PROOF OF SERVICE filed by Defendants Michigan Department of State Police and Director of Michigan State Police.

**1979**

Mar. 14 MOTION FOR SUMMARY JUDGMENT AND ACCELERATED JUDGMENT, AND NOTICE OF HEARING, MEMORANDUM OF LAW and PROOF OF SERVICE filed by Defendants Michigan Department of State Police and Director of Michigan State Police.

Mar. 21 Before Judge Kallman on motions, taken under advisement.

May 9 OPINION (denying Defendant's Motion for Summary Judgment; granting Defendant's Motion for Accelerated Judgment as to Count II; granting Plaintiff's Motion to Consolidate) filed. Copies sent to counsel



July 11 ORDER (denying Defendant's Motion for Summary Judgment as to Count I and granting Defendant's Motion for Accelerated Judgment as to Count II) filed. True copies returned to Defendant.

Aug. 22 ORDER (joining case with Ingham County Circuit Court Case No. 78-21187-AA) filed. True copies returned to Defendant. (Mr. Weller)

Oct. 9 AFFIDAVIT AND DEFAULT filed by Plaintiff.

**1981**

June 16 MOTION FOR SUMMARY AND/OR DEFAULT JUDGMENT ON THE ISSUE OF LIABILITY, NOTICE OF HEARING (7-22-81) and PROOF OF MAILING filed by Plaintiff.
Amount of Claim—
MOTION FEE RECEIPT #101731

July 22 Before Judge Brown on Plaintiff's Motion, Default set aside.

July 29 ANSWER BY STATE POLICE AND DIRECTOR, STATE POLICE and PROOF OF SERVICE filed.

Dec. 23 BRIEF ON BEHALF OF DEPARTMENT OF CIVIL SERVICE AND STATE PERSONNEL DIRECTOR and PROOF OF SERVICE filed.

**1982**

Jan. 5 RESPONSIVE BRIEF OF THE PLAINTIFF and PROOF OF SERVICE filed.

Nov. 19 OPINION OF THE COURT filed.

Nov. 29 OBJECTION TO PRESENTATION OF ORDER and PROOF OF SERVICE filed by Defendants Department of Civil Service and State Personnel Director.

Nov. 29 NOTICE OF OBJECTION TO ORDER PROPOSED BY PLAINTIFF and PROOF OF SERVICE filed by Defendant State Police.

**1983**

Jan. 3 JUDGMENT (in favor of Plaintiff except as to amount of damages; Department of Civil Service and State Personnel Director dismissed as defendants) filed. True copies returned to Defendant. (Mr. Weller)

Jan. 19 NOTICE OF SETTLEMENT OF PROPOSED CONCISE STATEMENT and PROOF OF SERVICE filed by Defendant.
Amount of Claim—RECEIPT #115843

Jan. 26 Before Judge Brown on Settlement of Concise Statement, Concise Statement signed.

Jan. 26 CONCISE STATEMENT OF PROCEEDINGS AND FACTS SO FAR AS THEY ARE MATERIAL filed. True copies (2) returned to Defendant.

Jan. 26 TRANSCRIPT (of proceedings had on 7-22-81) filed.

Feb. 8 MOTION FOR CLARIFICATION OF DECEMBER 30, 1982 SUMMARY JUDGMENT (set 2-18-83), BRIEF IN SUPPORT OF MOTION and PROOF OF SERVICE filed by Defendant.
Amount of Claim—RECEIPT #116129

Feb. 17 NOTICE OF HEARING ON ISSUE OF DAMAGES (3-8-83) and PROOF OF SERVICE filed by Plaintiff.

Feb. 18 PETITION FOR ATTORNEY FEES UNDER 42 USC 1988, AMENDED NOTICE OF HEARING ON ISSUE OF DAMAGES and NOTICE OF HEARING ON PETITION FOR



ATTORNEY FEES (3-8-83) and PROOF OF SERVICE filed by Plaintiff.

Feb. 18 Before Judge Brown on Motion for Clarification.

Mar. 8 TRANSCRIPT (of proceedings had on 2-18-83) filed.

Mar. 8 Before Judge Brown for hearing on Damages. Judgment for Plaintiff.

Mar. 14 NOTICE OF ENTRY OF FINAL JUDGMENT (proposed Final Judgment attached) and PROOF OF SERVICE filed by Plaintiff.

Mar. 17 MOTION FOR CLARIFICATION OF JUDGMENT, NOTICE OF HEARING (4-13-83) and PROOF OF SERVICE filed by Plaintiff.

**1983**

Mar. 18 OBJECTION TO PROPOSED JUDGMENT and PROOF OF SERVICE filed by Defendant.

Mar. 18 Letter to Judge Brown (re proposed Judgment) and Proof of Service filed by Defendant.

Mar. 24 AMENDED NOTICE OF HEARING (5-4-83) and PROOF OF SERVICE filed by Plaintiff.

May 4 AMENDED NOTICE OF HEARING (5-25-83) and PROOF OF MAILING filed by Plaintiff.

May 25 Before Judge Brown on Plaintiff's Motion for Clarification, heard in part, to be continued on 7-13-83.

May 25 MOTION BY APPELLANTS FOR DISMISSAL OF APPLICATION FOR LEAVE TO APPEAL, NOTICE OF HEARING and PROOF OF SERVICE filed.

May 31 AMENDED NOTICE OF HEARING (Plaintiff's Motion for Clarification of Judgment on 7-13-83) and PROOF OF MAILING filed by Plaintiff.

July 11 TRANSCRIPT (of hearing on 5-25-83) filed.

July 13 Before Judge Brown on Plaintiff's Motion for Clarification taken under advisement.

July 18 TRANSCRIPT (of hearing on 7-13-83) filed.

Aug. 12 MEMORANDUM IN SUPPORT OF MOTION FOR CLARIFICATION and PROOF OF MAILING filed by Plaintiff.

Aug. 18 RESPONSE BY STATE TO WILL BRIEF OF 8-12-83 RE "CLARIFICATION" SOUGHT BY MR. WILL and PROOF OF SERVICE filed.

Aug. 18 OPPOSITION BY STATE POLICE DEFENDANTS TO PLAINTIFF WILL'S ATTEMPT TO REINSTATE A DISMISSED COUNT THROUGH MECHANISM OF "CLARIFICATION" filed.

Oct. 6 OPINION (Plaintiff's Motion to Clarify Judgment denied) filed. Copies sent to counsel and Law Library.

Oct. 14 NOTICE OF SUBMISSION OF PROPOSED ORDER and PROOF OF SERVICE filed by Defendant.

Oct. 14 NOTICE OF SUBMISSION OF PROPOSED JUDGMENT and PROOF OF SERVICE filed by Defendant.

Oct. 25 TRANSCRIPT (of proceedings had on 3-8-83) filed.

Nov. 2 ORDER (Plaintiff's Motion for Clarification denied) filed. True copies sent to counsel.

Nov. 2 FINAL JUDGMENT AS TO AMOUNT OF DAMAGES (Plaintiff granted $153,232.64) filed. True copies sent to counsel.

Nov. 15 TRANSCRIPT (of proceedings had on 3-21-79) filed.



Nov. 15 CLAIM OF APPEAL filed by Defendant.

**1984**

Feb. 21 CALENDAR ENTRIES filed. Copies sent to counsel.

June 4 Received Court of Appeals Order granting Motion to Affirm.

Mar. 30* Received Supreme Court Order denying application for leave to appeal prior to decision by Court of Appeals.
*out of order

**1985**

July 10 Court of Appeals Opinion (judgment against Department of State Police is vacated-remanded for further proceedings as to liability of the Director of the State Police, and appropriate damages if liability is found) filed./gg

July 10 Court of Appeals Order (pursuant to Administrative Order 1984-2, this panel hereby certifies a conflict to the Michigan Supreme Court; parties have 20 days from 7-9-85 to make an appropriate filing under Administrative Order 1984-2) filed./gg

Sept. 26 Supreme Court Order (application for leave to appeal granted; this case is to be argued and submitted to the Court together with Smith v State of Michigan, No. 6768, one immediately following the other; the American Civil Liberties Union Fund of Michigan's motion to file brief amicus curiae granted) filed./gg

## RELEVANT DOCKET ENTRIES—COURT OF APPEALS

| Date | Proceedings |
|---|---|
| **1983** | |
| Nov 14 | CLAIM OF APPEAL |
| Nov 16 | NOTICE OF FILING TRANSCRIPT |
| Nov 28 | APPELLANTS' BRIEF |
| Dec 2 | CLAIM OF CROSS-APPEAL FROM COURT OF CLAIMS DENIAL OF PLAINTIFF'S MOTION FOR CLARIFICATION |
| **1984** | |
| Jan 18 | APPELLEE'S AND CROSS-APPELLANT'S BRIEF |
| Jan 19 | MOTION TO EXTEND TIME FOR APPELLEE'S BRIEF |
| Jan 19 | MOTION BY APPELLEE TO STRIKE CERTAIN APPELLANTS' EXHIBITS BECAUSE THEY CONTAIN ARGUMENT |
| Jan 19 | MOTION BY APPELLEE TO EXPAND RECORD ON APPEAL |
| Jan 23 | ANSWER BY APPELLANTS TO APPELLEE'S MOTION TO EXPAND RECORD ON APPEAL |
| Jan 24 | MOTION SUBMITTED |
| Jan 27 | MOTION BY CROSS-APPELLEES TO AFFIRM COURT OF CLAIMS ON CROSS-APPEAL |
| Jan 31 | RECORD REQUESTED |
| Feb 1 | ORDER GRANTING MOTION TO STRIKE CERTAIN OF APPELLANTS' EXHIBITS |
| Feb 1 | ORDER DENYING APPELLEE'S MOTION TO EXPAND RECORD ON APPEAL |
| Feb 8 | MOTION BY APPELLANTS TO SUBMIT SUPPLEMENTAL BRIEF |



| | |
|---|---|
| Feb 8 | SUPPLEMENTAL BRIEF FILED |
| Feb 10 | ANSWER TO APPELLANTS' MOTION TO SUBMIT SUPPLEMENTAL BRIEF |
| Feb 13 | REPLY TO ANSWER |
| Feb 14 | MOTION SUBMITTED |
| Feb 22 | RECORD REQUESTED |
| Feb 24 | RECORD FILED |
| Mar 13 | ORDER GRANTING APPELLANTS' REQUEST TO FILE SUPPLEMENTAL BRIEF |
| Mar 28 | ORDER BY SUPREME COURT DENYING SUPREME COURT BY-PASS |
| May 22 | MOTION TO AFFIRM COURT OF CLAIMS ON CROSS APPEAL SUBMITTED ON MOTION DOCKET |
| May 31 | NOTICED FOR OCTOBER |
| Jun 1 | ORDER GRANTING CROSS-APPELLEES' MOTION TO AFFIRM COURT OF CLAIMS ON CROSS-APPEAL |
| Aug 1 | MOTION BY APPELLANTS TO FILE SUPPLEMENTAL AUTHORITY |
| Aug 7 | ANSWER BY APPELLEE |
| Aug 14 | MOTION SUBMITTED |
| Aug 28 | ORDER GRANTING MOTION |
| Oct 12 | SUBMITTED ON CASE CALL |
| **1985** | |
| Jul 9 | OPINION FILED |
| Jul 9 | ORDER CERTIFYING CONFLICT TO SUPREME COURT |
| Jul 10 | COURT OF APPEALS CERTIFICATE TO SUPREME COURT RE CONFLICT |
| Jul 12 | TRANSFERRED TO SUPREME COURT |

## Certified Docket Entries

| | PLAINTIFF'S ATTY | DEFENDANT'S ATTY |
|---|---|---|
| Ray, Eugene Will, Plaintiff-Appellee | Lawrence J. Emery<br>3401 E. Saginaw,<br>Ste 104<br>Lansing, MI 48912 | George H. Weller<br>525 W. Ottawa<br>600 Law Building<br>Lansing, MI 48913 |

vs 76838

Dept of Civil Service and
Dept of State Police,
Defendants-Appellants

Appeal from Court of Appeals #74840
Court of Claims — Thomas L. Brown

| DATE | PROCEEDINGS |
|---|---|
| *1985* | |
| July 10 | Court of Appeals Certified to Supreme Court Regarding Conflict. |
| " 15 | Application for Leave to Appeal by defendant filed. |
| " 15 | Court of Appeals and Ct of Claims records filed. |
| " 19 | Mich State Police brief regarding conflict filed. |
| " 30 | Application for Leave to Appeal by plaintiff filed. |
| Aug 2 | Answer by defendant to plaintiff's application filed. |
| " 9 | Miscellaneous pleading—Response by cross-appellee filed. |
| " " | Miscellaneous pleading—Plaintiff's response to State Police Application filed. |
| " 13 | Answer by State Police to plaintiff's response of (8/9) filed. |
| " 28 | Motion to file brief *amicus curiae* (ACLU) filed. |
| Sept 10 | Miscellaneous pleading—Additional Case Authority. |
| " 25 | Ordered application GRANTED and *amicus curiae* GRANTED. |
| Dec 23 | Plaintiff-Appellant's brief on appeal filed. |
| " 26 | Defendants-Appellants' brief on appeal filed. |



| DATE | PROCEEDINGS |
|---|---|
| " " | ACLU *amicus curiae* brief filed. |
| *1986* | |
| Feb 7 | Motion for Permission for oral argument by ACLU filed. |
| " 10 | Defendants-Appellees brief on appeal filed. |
| " 11 | Ordered motion by ACLU for oral argument DENIED. |
| " 25 | Miscellaneous pleading—Reply by State Police to *amicus* motion filed. |
| Mar 6 | Oral arguments heard and submitted. |
| " 11 | Post Argument Motion to supplement authorities by defendant filed. |
| " 27 | Answer to Motion to supplement by plaintiff filed. |
| Apr 11 | Post Argument Motion to supplement citations by defendant filed. |
| May 16 | Miscellaneous pleading—Supplement to supplemental citations filed. |
| Sept 22 | Motion to file supplemental authorities by defendant filed. |
| Oct 16 | Ordered defendants' motions to supplement DENIED. |
| Nov 10 | Circuit Court record filed. |
| *1987* | |
| Jan 21 | Ordered defendants' motion to supplement DENIED. |
| Aug 7 | Supreme Court Opinion (Affirmed in Part, Reversed in Part, Remanded). |
| " 28 | Motion for Rehearing by Plaintiff filed. |
| Sept 3 | Answer to Rehearing by defendant filed. |
| Oct 12 | Ordered rehearing DENIED. |
| " " | Remittitur and records returned. |

| DATE | PROCEEDINGS |
|---|---|
| *1988* | |
| Jan 25 | Miscellaneous filing—Notice of filing petition for certiorari to US Supreme Court filed. |
| Apr 25 | Miscellaneous filing—US Supreme Court order granting certiorari filed. |

STATE OF MICHIGAN—ss.

I, Corbin R. Davis, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of the docket entries in this cause; that I have compared the same with the original and that this is a true transcript and whole thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this *twenty-ninth* day of *April* in the year of our Lord one thousand nine hundred and eighty-eight.

/s/ CORBIN R. DAVIS
Corbin R. Davis, Clerk.



STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF INGHAM
File No. 78-21187-AA

RAY EUGENE WILL,
*Plaintiff*,

—v.—

DEPARTMENT OF CIVIL SERVICE MICHIGAN DEPARTMENT OF STATE POLICE, DIRECTOR OF MICHIGAN STATE POLICE, STATE PERSONNEL DIRECTOR,
*Defendants.*

At a session of the Court held at Lansing, Michigan on June 26, 1978

HONORABLE THOMAS L. BROWN
CIRCUIT JUDGE

ORDER

Defendants Michigan Department of State Police and Director of Michigan State Police having moved to remand this case for a hearing at the fourth step of the grievance procedure of the Civil Service Commission; and

The Court having considered the materials submitted by the parties; and

The Court having heard oral argument; and

The Court being fully advised in the premises; now

IT IS ORDERED that this case is remanded for a hearing at the fourth step of the grievance procedure of the Civil Service Commission. The Court retains jurisdiction to review any appeal from the decision of the Civil Service Hearing Officer as affirmed or modified by the Civil Service Commission.

/s/ THOMAS L. BROWN
CIRCUIT JUDGE

Approved as to form:

FRANK J. KELLEY (P 15818)
Attorney General

/s/ GEORGE H. WELLER
GEORGE H. WELLER (P 26249)
Assistant Attorney General
Attorneys for defendants
Department of State Police and
Director of Michigan State Police
6th Floor, Law Building
Lansing, Michigan 48913
(517) 373-1330

Dated: Lansing, Michigan
June 19, 1978

Approved as to form:

/s/ LAWRENCE J. EMERY
LAWRENCE J. EMERY (P 23263)
Reid & Reid P.C.
Attorney for Plaintiff
530 S. Capitol Avenue
Lansing, Michigan 48933
(517) 482-1165

Dated: June 23, 1978

Approved as to form:

FRANK J. KELLEY (P 15818)
Attorney General

/s/ VARDA N. FINK
VARDA N. FINK (P 23277)
Assistant Attorney General
Attorneys for defendants
Department of Civil Service
and State Personnel Director
300 Stoddard Building
Lansing, Michigan 48933
(517) 373-1162

Dated: Lansing, Michigan
June 26, 1978

A TRUE COPY
[ILLEGIBLE]



FILED—Nov. 10, 1978—COURT OF CLAIMS
BY GG CLERK

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

| | |
|---|---|
| RAY EUGENE WILL,<br>Plaintiff,<br>-vs-<br>DEPARTMENT OF CIVIL SERVICE, MICHIGAN DEPARTMENT OF STATE POLICE, STATE PERSONNEL DIRECTOR, DIRECTOR OF MICHIGAN STATE POLICE,<br>Defendant. | FILE NO. 6667 |

**COMPLAINT**

Now comes Plaintiff, RAY EUGENE WILL, by his Attorneys, REID & REID, P.C., by LAWRENCE J. EMERY, and complains as follows:

**COMMON ALLEGATIONS**

1. Plaintiff, Ray Eugene Will, is a citizen of the United States of America and a resident of the County of Ingham, State of Michigan.

2. That Defendant, Department of Civil Service, is an agency of the State of Michigan established by both Constitution and statute.

3. That Defendant, State Personnel Director, is a Constitutional officer with responsibility for the administration of the State Civil Service Commission.

4. That Defendant, Department of State Police, is an agency of the State of Michigan created by the statutes thereof.

5. That Defendant, Director of State Police, is a State officer with responsibility for the administration of the State Police.

6. That Plaintiff is currently employed by the State of Michigan within the Department of State Highways and Transportion.

7. That Plaintiff first obtained employment with the State of Michigan on or about March, 1969.

8. That Plaintiff was originally hired as a College Trainee 07 and worked with the Department of State as a Civil Service classified employee.

9. That Plaintiff held the position of Administrative Analyst 11 in August of 1973.

10. That after taking and passing the required examination for the job of Data Systems Analyst 11 and qualifying for said classification, Plaintiff sought to obtain employment in said classification with the Michigan Department of State Police in August, 1973.

11. That during August, 1973, Plaintiff's competitive test scores ranked him as one of the top qualifiers on a merit basis for the position.

12. That on or after August 9, 1973, Plaintiff was interviewed by the Department of State Police of the State of Michigan for the position of Data Systems Analyst 11.



13. That after August, 1973, Plaintiff applied for the job of Administrative Analyst 13 with the Department of State Police, but was told prior to interview that someone else was in line for that position.

14. That on or about August 9, 1973, agents of the Michigan Department of State Police assigned to compile and keep files on persons involved in various political activities did inform the Personnel Department of the Michigan State Police that Plaintiff's brother, Charles W. Will, was a subject of surveillance and investigation by the Michigan State Police, Special Investigation Unit.

15. That information contained in the file on Charles W. Will conveyed the impression that said Charles W. Will was engaged in activity that is subversive in that it included:

a. Charles W. Will's membership in Students for a Democratic Society (SDS).

b. A description of Charles W. Will as a self-described "radical."

c. Surveillance report indicating Charles W. Will's attendance at various anti-war demonstrations at Michigan State University.

d. A hearsay statement from an unnamed informant claiming that Charles W. Will stated "that the computer center would be blown up before classes started."

e. Report indicating Charles W. Will's attendance at "Crisis In America" meetings on the campus of Michigan State University.

16. That in an Order of Judgment dated January 16, 1975, amended February 3, 1976, the Ingham County Circuit

Court, the Honorable Thomas L. Brown presiding, judicially determined that the statutory authority for the conduct of Defendants was "unconstitutional, and therefore, unenforceable, null and void." (See Amended Order of Judgment, attached as Exhibit A)

17. That Plaintiff was not the direct object of this surveillance and investigation report compiled by the Michigan Department of State Police.

18. That neither Plaintiff nor his brother, Charles W. Will, were notified that such a file was being compiled and used by Defendants until an Order to make said files available was issued by this Court.

19. That the Defendant, Michigan Department of State Police, did not seek Plaintiff's or Charles W. Will's consent for the preparation or use of said report.

20. That the information in the file compiled and kept concerning his brother, Charles W. Will, was obtained, compiled, and kept secret from Plaintiff and his brother.

21. That during the period during which Plaintiff was being interviewed for the positions described above, he was never notified that there was a file concerning his brother or that said file was being considered or used in connection with his application for employment.

22. That it was a common practice for the Special Investigating Unit to disclose the contents of their files to other administrative agencies of the State including the Department of State Police and Civil Service Commission.

23. That disclosures of the kind described in paragraph 22 were made where public employment was involved.



24. That said information was passed on to the Personnel Department of the Michigan Department of State Police without Plaintiff or his brother's consent or knowledge in August, 1973, in connection with Plaintiff's application for employment.

25. That the existence of the aforesaid file compiled and kept concerning Charles W. Will was not known to Plaintiff or his brother, Charles W. Will, until April, 1977, when said files were released by Order of the Ingham County Circuit Court.

26. That the Defendant, Department of State Police, improperly used the above described report on Charles W. Will in reviewing Plaintiff's request for employment as a Data Systems Analyst 11 and Administrative Analyst 13.

27. That after discovery of the existence and use of the file on Charles W. Will, Plaintiff filed on employee grievance under the rules of the Civil Service Commission.

28. That said grievance was denied by the Defendant, Civil Service Commission, for the reason that it was not timely. (See copy of Grievance Decision, dated 7-19-77, Exhibit B)

29. That Plaintiff thereafter appealed the decision of the hearing officer to the Defendant, Civil Service Commission.

30. That on or about November 10, 1977, the Defendant, Civil Service Commission, denied Plaintiff's "Application for Leave to Appeal." (See copy of the letter, dated 11-15-77, Exhibit C)

## COUNT I

31. Plaintiff hereby incorporates by reference each and every allegation in paragraphs 1 through 30, and further alleges:

32. That the compilation and use of the files of the Special Investigative Unit of the Department of State Police violates the civil and constitutional rights of Plaintiff in that:

a. The files themselves were compiled under a statutory scheme that violates both the United States and Michigan Constitutions.

b. That the information in those files was obtained in violation of Plaintiff's right to privacy as guaranteed by the United States and Michigan Constitutions.

c. That the information in those files was obtained in violation of Plaintiff's rights to free speech and association as guaranteed by the United States and Michigan Constitutions.

d. That the information in those files was obtained in violation of Plaintiff's political and civil rights as guaranteed by Const. 1963, Art 1, Section 2.

33. That the aforesaid compilation and use of the files of Plaintiff's brother was accomplished under color of State law contrary to 42 USC §1983.

## COUNT II

34. Plaintiff hereby incorporates by reference each and every allegation in paragraphs 1 through 33, and further alleges:



35. That Const 1963, Art XI, Section 5 guarantees that applicants for public employment or promotion shall be based on merit.

36. That by using the fact that Plaintiff's brother was the object of surveillance as a possible subversive, Defendant, Department of State Police, engaged in conduct that violates the constitutional requirement of public employment and promotion on the basis of merit.

37. That in using Plaintiff's mere association or relationship to his brother as a factor in determining his qualification for employment or promotion, the Defendant, Department of State Police, and its Director denied Plaintiff's right to due process of law and rights created under Const 1963, ART XI, Section 5.

## RELIEF

38. Plaintiff hereby incorporates by reference each and every allegation in paragraphs 1 through 37, and in addition request the following relief:

39. That Plaintiff is entitled to monetary damages in an amount in excess of $10,000 representing an award for the humiliatic ridicule, and embarrassment caused by the conduct of Defendants.

40. That Plaintiff is entitled to monetary damages in an amount in excess of $10,000 representing the differential in compensation caused by failure to promote Plaintiff in 1973, including loss of seniority and longevity, and other benefits.

41. That Plaintiff is entitled to exemplary damages in the amount of $500,000.

42. That Plaintiff is entitled to such other relief as is deemed appropriate to remedy the conduct of Defendants.

WHEREFORE, Plaintiff requests:

First, compensatory damages in an amount in excess of $10,000 to reimburse Plaintiff for the differential in compensation and benefits since 1973, the lost opportunity for promotion and advancement, and for humiliation, ridicule and embarrassment due to conduct of Defendants.

Second, exemplary damages in the amount of $500,000.

Third, such other relief as this Court deems equitable and appropriate.

Ray Eugene Will /s/
RAY EUGENE WILL
Plaintiff

Dated: November 10, 1978.



STATE OF MICHIGAN }
COUNTY OF INGHAM } ss.

On this 10th day of November, 1978, before me personally appeared the above named Plaintiff, RAY EUGENE WILL, and made oath that he has read the foregoing Complaint by him subscribed and knows the contents thereof and that the same is true to his own knowledge and belief, except as to those matters which he states to be upon information and belief, and as to those matters he believes them to be true.

Kyle Evan Cowden /s/
Kyle Evan Cowden
Notary Public,
Ingham County, Michigan
My Commission Expires:
July 18, 1982.

THIS DOCUMENT DRAFTED BY:

Lawrence J. Emery /s/
LAWRENCE J. EMERY (P23263)
Attorney for the Plaintiff
REID & REID, P.C.
530 South Capitol Avenue
Lansing, Michigan 48933

STATE OF MICHIGAN
COURT OF CLAIMS

| | |
|---|---|
| RAY EUGENE WILL,<br>Plaintiff,<br>-vs-<br>DEPARTMENT OF CIVIL SERVICE, MICHIGAN DEPARTMENT OF STATE POLICE, STATE PERSONNEL DIRECTOR, DIRECTOR OF MICHIGAN STATE POLICE,<br>Defendants. | No. 6667 |

**OPINION**

The Court, having heard the oral arguments of counsel and being fully advised in the premises, makes the following determinations:

**FACTS**

On August 9, 1973, as permitted by 1950 PA Ex Sess 39 and 40, the Michigan State Police Personnel Office was advised that plaintiff's brother had a file maintained by the State Police under the provisions of 1950 Ex Sess 38, 39 and 40 (subversion).

These three statutes were declared unconstitutional by the Circuit Courts of Ingham County and Wayne County in 1976.

Plaintiff was not interviewed for a lateral transfer to the Department of State Police, apparently because of the information.



Upon learning of the 1973 action, plaintiff sought a hearing under the Civil Service grievance procedure but the hearing was denied and the denial was upheld by the Civil Service Commission.

Plaintiff then sought review in Circuit Court. Upon learning of the facts, the Attorney General on behalf of the State Police defendants sought and obtained an order from the Circuit Court directing that a grievance proceeding be held. Preparations are going ahead for the grievance hearing.

Plaintiff now seeks damages in the Court of Claims. The State Police defendants move for summary judgment and accelerated judgment.

**DISCUSSION**

Plaintiff has not yet exhausted his administrative remedies. A grievance proceeding has been ordered and is in the process of being organized. At the conclusion of the administrative proceedings, plaintiff may appeal to the Circuit Court of Ingham County. An action at this time in the Court of Claims is improper and accelerated judgment as to Count II is hereby granted.

**SUMMARY JUDGMENT**

The defendants move for summary judgment because they believe that the State Police are immune from liability.

It is a matter of fact whether or not the State Police were acting in a governmental capacity or if the State Police exceeded their authority. If the State Police were acting in a governmental capacity and did not exceed their au-

thority, they are immune. If not, it may be found that they are liable. Because there is a question of fact involved, summary judgment as a matter of law is hereby denied.

**MOTION TO CONSOLIDATE**

Plaintiff has moved to consolidate this matter with the case *Will* v *Department of Civil Service*, File No. 78-21187-AA, now pending in the Ingham County Circuit Court before the Honorable Thomas L. Brown. Since both this matter and the case pending in Ingham Circuit Court involve the same cause of action and the same parties, plaintiff's motion to consolidate is hereby granted.

**CONCLUSION**

Defendants' motion for summary judgment is denied; defendants' motion for accelerated judgment as to Count II is granted and plaintiff's motion to consolidate this matter with *Will* v *Department of Civil Service*, File No. 78-21187-AA now pending in Ingham County Circuit Court is hereby granted. Orders may be entered in conformity with this opinion.

James T. Kallman /s/
James T. Kallman, Circuit Judge

May 7, 1979



FILED—JULY 11, 1979
COURT OF CLAIMS—BY gg CLERK

STATE OF MICHIGAN
COURT OF CLAIMS

| | |
|---|---|
| RAY ENGENE WILL,<br>Plaintiff,<br>v<br>DEPARTMENT OF CIVIL SERVICE, MICHIGAN DEPARTMENT OF STATE POLICE, STATE PERSONNEL DIRECTOR, DIRECTOR OF MICHIGAN STATE POLICE,<br>Defendants. | Docket No. 6667 |

**ORDER**

At a session of the Court held at Lansing, Michigan on July 10, 1979.

PRESENT: HONORABLE JAMES T. KALLMAN
CIRCUIT JUDGE

Defendants having moved under GCR 117.2(1) for summary judgment as to Count I because plaintiff fails to state a claim upon which relief can be granted, defendants being immune from liability; and

Defendants having moved under GCR 116.1(2) for accelerated judgment as to Count II because the Court of Claims lacks jurisdiction of the subject matter, jurisdiction being in the Circuit Court upon completion of administrative remedies; and

The Court having considered the materials submitted by counsel for all parties, and having heard counsel for all parties in oral argument; and

The Court being fully advised in the premises; and

It appearing to the Court that there is a genuine issue of fact under Count I that must be resolved before any determination can be made as to defendants' immunity from liability; and

It appearing to the Court as to Count II that after plaintiff has exhausted his administrative remedies, review may be had in the Circuit Court; NOW

IT IS ORDERED that the motion of defendants for summary judgment as to Count I be denied; and

IT IS ORDERED that the motion of defendants for accelerated judgment as to Count II be granted, and a judgment is entered in favor of defendants as to Count II.

Costs to await final determination.

/s/ James T. Kallman

countersigned
/s/ Mary Dent
Clerk



Approved as to form:

FRANK J. KELLEY (P 15818)
Attorney General

George H. Weller /s/
GEORGE H. WELLER (P 26249)
Assistant Attorney General
Counsel for defendants
Michigan Department of State Police and
Director of Michigan State Police
Office Address:
7th Floor, Law Building
525 W. Ottawa
Lansing, Michigan 48913
(517) 373-8060

Dated: May 14, 1979

Approved as to form:

FRANK J. KELLEY (P 15818)
Attorney General

Robert S. Welliver /s/
ROBERT S. WELLIVER (P 23084)
Assistant Attorney General
Counsel for defendants
Department of Civil Service
and State Personnel Director

Office Address:
300 Stoddard Building
127 W. Allegan
Lansing, Michigan 48933
(517) 373-1162

Dated: May 15, 1979

Approved as to form:

Lawrence J. Emery /s/
LAWRENCE J. EMERY (P 23263)
Counsel for plaintiff
c/o Reid and Reid P.C.
500 S. Capitol Avenue
Lansing, Michigan 48933
(517) 482-1165

Dated: June 28, 1979

A TRUE COPY—COURT OF CLAIMS
BY gg CLERK



FILED—Aug. 22, 1979—COURT OF CLAIMS
BY GG CLERK

STATE OF MICHIGAN

COURT OF CLAIMS

| | |
|---|---|
| RAY EUGENE WILL,<br>Plaintiff,<br>v<br>DEPARTMENT OF CIVIL SERVICE, MICHIGAN DEPARTMENT OF STATE POLICE, STATE PERSONNEL DIRECTOR, DIRECTOR OF MICHIGAN STATE POLICE,<br>Defendants. | Docket No. 6667 |

**ORDER**

At a session of the Court held at Lansing, Michigan on August 22, 1979.

PRESENT: HONORABLE JAMES T. KALLMAN CIRCUIT JUDGE AND JUDGE OF THE COURT OF CLAIMS.

Plaintiff having moved to join this matter with a case arising out of the same transaction pending in the Circuit Court; and

Defendants having agreed in open court to the joinder; and

It appearing to the Court that this Court of Claims case should be joined with the case in the Circuit Court, and

The Court having issued an opinion to this effect; NOW

IT IS ORDERED, pursuant to RJA 6421, MCLA 600.6421, MSA 27A.6421, that the case of *Will* v *Department of Civil Service et al*, Court of Claims, Docket No. 6667, is joined with *Will* v *Department of Civil Service et al* Circuit Court, Thirtieth Circuit, Ingham County, File No. 78-21187-AA.

Ray C. Hotchkiss /s/
Acting

A TRUE COPY—COURT OF CLAIMS—BY GG CLERK

Notice of entry of Order Waived:

Frank J. Kelley (P 15818)
Attorney General

George H. Weller /s/
George H. Weller (P 26249)
Assistant Attorney General
Counsel for defendants
Department of State Police and
Director Department of State Police
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7th Floor, Law Building
525 W. Ottawa
Lansing, Michigan 48913
(517) 373-8060



Dated: July 31, 1979

Notice of entry of Order waived:

Frank J. Kelley (P 15818)
Attorney General

Robert S. Welliver /s/
Robert S. Welliver (P 23084)
Assistant Attorney General
Counsel for defendants
Department of Civil Service and
State Personnel Director
Office Address:
300 Senate Office Building
127 W. Allegan
Lansing, Michigan 48913
(517) 373-1162

Dated: July 31, 1979

Notice of entry of Order waived:

Lawrence J. Emery /s/
Lawrence J. Emery (P 23263)
Counsel for plaintiff
c/o Reid and Reid, P.C.
500 S. Capitol Avenue
Lansing, Michigan 48933
(517) 482-1165

Dated: Aug. 10, 1979

State of Michigan

DEPARTMENT OF CIVIL SERVICE
HEARINGS DIVISION

Mailing Date: June 10, 1980

**A GRIEVANCE DECISION**

RAY EUGENE WILL HO 263-80

and

DEPARTMENT OF STATE POLICE

B – APPOINTMENT
3 – PERSONAL DISCRIMINATION
6 – PROCEDURAL DEFICIENCY
7 – PERSONAL QUALIFICATIONS

**HEARING OFFICER**

Samuel E. McCargo, Esq.
Hearing Officer Panel
Hearings Division

**HEARINGS REPORTER**

Ms. Elaine Milner
Ms. Denise Grahl, TOPS

**APPEARANCES**

**Employee**

Mr. Ray Eugene Will, Grievant
Mr. Lawrence J. Emery, Attorney
Mr. John D. Golden, Law Clerk
Mr. Walter L. Riley, Personnel Officer (retired)
Ms. Jane Martin, Data Systems Analysis Supervisor
Mr. George Lipscomb, Data Systems Analysis Supervisor



**Department of State Police**

Mr. George H. Weller, Assistant Attorney General
Mr. Michael Hodge, Assistant Attorney General

A fourth-step grievance hearing was held on July 21, 1979 and August 2, 1979 at the Hearings Division, Department of Civil Service, 608 South Washington Avenue, Second Floor Conference Room, Lansing, Michigan 48933.

**THE ISSUE**

Was denial of employment opportunity in violation of Civil Service Rules?

**FACTS**

This matter having been remanded to the Department of Civil Service for a fourth-step grievance hearing by the Ingham County Circuit Court, the parties and the Hearing Officer agreed that proposed findings of fact and conclusions of law would be submitted in writing at the conclusion of the hearing. In accordance with this stipulation on the record, the parties have submitted proposed findings of fact and conclusions of law. After reviewing the submissions of the parties, the hearing file in this matter and all documents and exhibits submitted in these hearings, the Hearing Officer makes the following specific findings of fact:

1. During 1970 and 1971, Grievant's brother, Charles Will, received extensive publicity, including newspaper coverage, for his anti-war activities and liberal political views.

2. During the summer of 1973, the Department of State Police was engaged in the process of interviewing and hiring employees for three Data Systems Analyst 11 positions.

3. The candidates for the above described positions came from promotional registers for Data Systems Analyst 11's and from transfer requests from Data Systems Analysts classified as 11's.

4. Grievant took the open competitive test for promotional register placement for all Data Systems Analyst 11 positions open at that time (summer, 1973).

5. Grievant's score on the promotional examination was 85.

6. The first promotional register for the Data Systems Analyst 11 positions was issued on June 8, 1973 and expired on or about July 12, 1973.

7. Grievant was ranked No. 17 on the June 8, 1973 promotional register.

8. Two Data Systems Analyst 11's were hired from June 8, 1973 promotional register; and both had higher scores than Grievant.

9. There was no promotional register effective between July 12, 1973 and August 28, 1973.

10. In anticipation of completing the selection process for the remaining vacancy in the Data Systems Analyst 11 classification, the Department of State Police continued its interview and screening process between July 12, 1973 and August 28, 1973.



11. Grievant was interviewed on or about August 6, 1973 by Mr. Walter Riley, Ms. Jane Martin, and Mr. George Lipscomb, individually.

12. During the interview with Mr. Riley, Grievant completed a "background information sheet" which was submitted to the personnel office of the Department of State Police for a background and security check.

13. During the interview with Mr. Riley on August 6, 1973 the Grievant's brother's political activities were discussed and Mr. Riley submitted this information to the Special Investigation Unit which notified the Personnel Office of the Special Investigation Unit file on Charles Will.

14. The Grievant discussed his brother with Mr. Martin during his interview with her. However, Ms. Martin does not recall if personnel advised or notified her of any security problems.

15. Mr. Lipscomb did not receive any information of any type of security problem in the Grievant's case from the Special Investigation Unit or the Personnel Office.

16. The Grievant's background information sheet was unavailable at the fourth-step grievance in this matter because, in accordance with the normal practice of the Department, it was destroyed or discarded after the selection process was complete.

17. Joint Exhibit 12 contains a record maintained by the Special Investigation Unit on Charles Will, which contains the statement; "subject's brother, Ray Eugene, D.O.B. 2-27-44, made application for employment with MSP, personnel advised 8-9-73."

18. A second Data Systems Analyst 11 promotion register was issued on August 29, 1973.

19. Grievant ranked No. 2 on the August 29, 1973 promotional register but the No. 1 candidate waived (i.e., withdrew).

20. No one was hired as a Data Systems Analyst from the August 29, 1973 promotional register.

21. The final vacancy was filled, not by promotion, but by a lateral transfer of a civil service employee already classified as Data Systems Analyst 11.

22. The No. 4 employee on the August 29, 1973 promotional register (Gene O. Miller) was offered the job as Data Systems Analysis 11, but did not accept the position.

23. Transfer requests did not appear on the promotional registers, but as a matter of practice and procedure, appeared on a separate list.

24. Security checks, except for arrest records, were normally conducted by phone during the summer of 1973.

## STATEMENT OF CASE

The following documents were submitted by the parties in support of their respective positions:

Joint Exhibit 1: Cover letter and Order of Judge Thomas L. Brown for the Circuit Court of the County of Ingham remanding this case for a hearing at the fourth-step grievance procedure of the Civil Service Commission;



Joint Exhibits 2 & 3: Notices of Hearing;

Joint Exhibit 4: Letter from Mr. George L. McCargar of the Attorney General's Office regarding scheduling hearing in this matter;

Joint Exhibit 5: Letter from Mr. Marshall Burns, Grievant's Appeal's Officer, to Mr. Ray Eugene Will regarding Mr. Will's attorney's request for a prehearing conference, the unavailability of Departmental representatives for the scheduled hearing, and procedures for scheduling grievance hearings;

Joint Exhibit 6: Letter from Mr. Lawrence J. Emery, attorney for the Grievant, to Mr. Marshall Burns, Scheduling Officer, regarding grievance hearing scheduled for October 4, 1978;

Joint Exhibits 7 & 8: Notices of Hearing;

Joint Exhibit 9: Letter from Mrs. Joyce Getter, Appeals Officer to Captain Edward A. Lenon, Department of State Police regarding appellate procedures before the Department of Civil Service involving a fourth-step grievance hearing;

Joint Exhibit 10: Letter from Mrs. Joyce Getter, Appeals Officer, to Mr. Ray Eugene Will regarding appellate procedure under Section 4 of the grievance and appeals procedure of the Department of Civil Service;

Joint Exhibit 11: Hearing Officer packet containing oath of office and grievances in this matter originally scheduled before John G. Fitch;

Joint Exhibit 12: Application for leave to appeal after final decision of Hearing Officer before State of Michigan Department of Civil Service filed by Mr. Lawrence J. Emery in behalf of Mr. Ray Eugene Will with attachments;

Joint Exhibit 13: Responsive Brief in Opposition of Application for Leave to Appeal Decision of Hearing Officer filed by Mr. Earl W. James, Lieutenant, Employee Relations section, Department of State Police;

Joint Exhibit 14: July 19, 1977 Opinion of Hearing Officer John G. Fitch in the matter of Ray Eugene Will and the Department of State Police No. HO 216-77;

Joint Exhibit 15: November 10, 1977 Commission decision in the appeal of Ray Eugene Will in the matter of Ray Eugene Will and the Department of State Police No. HO 216-77;

Joint Exhibit 16: Civil Service Rule No. 1.1 Merit, Efficiency, and Fitness, and 1.2 No Discrimination;

Joint Exhibit 17: Article IX of the Constitution of the State of Michigan;

Joint Exhibit 18: Notice of Grievance Hearing;

Grievant's Exhibit 1: Letter from Mr. Neal VanderVeen, Employee Relations Officer, Department of State Police to Mr. George H. Weller, Assistant Attorney General regarding Will vs. Department of Civil Service, et al, with attachments and identification of proposed witnesses for fourth-step grievance hearing;



Grievant's Exhibit 2: Letter from Mr. George H. Weller to Mr. Lawrence J. Emery regarding access to prospective witnesses and documents relating to the matter of Will vs. Department of State Police;

Grievant's Exhibit 3: Affidavit of Mr. William D. Hassinger, Jr., dated September 22, 1975;

Grievant's Exhibit 4: Amended Order of Judgment dated February 3, 1976 from the Ingham County Circuit Court, Judge Thomas L. Brown (Human Rights Party vs. Department of State Police, et al, No. 75-17499-AA);

Grievant's Exhibit 5: Office of Criminal Justice Programs Grant Application Form No. 31-0603-CL, dated October 28, 1970;

Department Exhibit 1: Memorandum of Law by Department of State Police on burden of proof and degree of proof dated June 21, 1979.

Mr. Walter L. Riley testified regarding his responsibilities in the hiring and promotion process with the Department of State Police. He also testified regarding his recollection, or absence thereof, of Mr. Ray E. Will and his interview of Mr. Will durin_ August of 1973. The witness reviewed several documents, including Grievant's Exhibit 1 and Joint Exhibit 12 and discussed his knowledge of the contents, notations and modifications on the above mentioned documents. Mr. Riley also testified regarding his knowledge of the subversive activities investigations by the Department of State Police, the functioning of the Special Investigation Unit and the development and use of intelligence information for personnel related decisions.

Ms. Jane Martin, Data Systems Analysis Supervisor, testified regarding her employment with the State Police during 1973 and 1974. She described her duties and discussed her involvement in the selection process for Data Systems Analysts 11 during the summer of 1973. Further, Ms. Martin discussed her knowledge of the subversive activities investigations and the functioning of the Special Investigation Unit of the Department of State Police. She also testified regarding her interview with Mr. Ray E. Will and the matters she considered in making recommendations regarding Mr. Will's appointment to a Data Systems Analyst 11 position with the Department of State Police.

Mr. George Lipscomb, Data Systems Analysts Supervisor, testified regarding his supervisory authority and responsibilities over both Ms. Martin and the interview process for selection of Data Systems Analyst 11's during the summer of 1973. Though Mr. Lipscomb did not remember Mr. Will, he did recall the interview process during the summer of 1973. Mr. Lipscomb also discussed the promotional registers developed for the Data Systems Analyst position in June and August of 1973. Upon reviewing the promotional registers, Grievant's Exhibit 1, Mr. Lipscomb also provided information on the notations on the document, particularly those notations made by Mr. Lipscomb during the interview process or during phone conversations with the candidates identified on the list. Finally, Mr. Lipscomb testified regarding Mr. Will's interviews and the investigation into Mr. Will's prior experiences in the Data Systems Analyst area.

The Grievant, Mr. Ray E. Will, testified regarding his professional background and his promotional history within the Department of Civil Service. Mr. Will discussed his experiences, transfers and applications for promotions dur-



ing the month of May through June, 1973. Additionally, Mr. Will discussed his August interview for the Data Systems Analyst 11 position with the Department of State Police; this discussion included a description of the interview with Mr. Riley, Ms. Martin and Mr. Lipscomb. Finally, Mr. Will reviewed Joint Exhibit 12, and indicated that he had no knowledge of the attachment marked Exhibit A which is the subject of this grievance until 1977.

## DISCUSSION

The Hearing Officer first notes that the Constitutional and Civil Service Rules provisions pertinent to this grievance are set forth appropriately in the Department's proposed findings of fact and conclusions of law at pages 6 and 7 as follows:

> "Pertinent to Grievant's assertions is the following language of Article 11, § 5:
>
> '. . . The commission shall . . . determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service, . . .
>
> '. . . No appointments, promotions, demotions or removals in the classified service shall be made for . . . partisan considerations.'

Similarly, Rule 1.1 and 1.2 provide:

> '1.1 All appointments and promotions to positions in the state civil service and all measures for the control and regulation of employment in such positions, and

separation therefrom, shall be based on merit, efficiency and fitness.

'1.2 No person shall be discriminated against in seeking employment, in being appointed or promoted, in any conditions of his employment, in the state civil service, or any separation therefrom, because of race, color, religion, national origin, ancestry, or because of partisan considerations. No person shall be discriminated against in any conditions of his employment because of age or sex, except when it has been determined that age or sex is a bona fide occupational qualification.'"

Second, the Hearing Officer also notes that this entire dispute arises out of a notation set forth in Joint Exhibit 12 which appears in a record of a file maintained on Charles (Chuck) Will, on card no. 2. The notation provides as follows:

"Subject's brother, Ray Eugene, DOB 2-27-44, made application for employment with MSP. Personnel advised – 8-9-73."

Of particular note, is the date of this file reference i.e., August 9, 1973. Additionally, the Hearing Officer notes that the Grievant asserts that his personal concern over this notation is corroborated by handwritten notations on an August 29, 1973 promotional register which suggests a "security" problem with the Grievant for placement in a Data Systems Analyst II position with the Department of State Police.

Upon careful review of the file, the Hearing Officer finds that despite the Department's involvement in selection procedures for three Data Systems Analyst II positions during the summer of 1973, only one of those positions is material



to this grievance. The Hearing Officer finds, that the Data Systems Analyst II positions (two vacancies) which were filled by promoting and appointing employees from a June 8, 1973 promotional register may be relevant as background information but are not material to the resolution of the issues raised by Grievant herein. This finding is based on the fact that there is no written documentation and no testimony from either the Grievant or the Department to suggest that a security check, or security problem, or Special Investigation Unit files were in any way involved or consulted during the selection process which preceded the expiration of the June 8, 1973 promotional register.

Now, turning to the third Data Systems Analyst II position which was not filled from the June 8, 1973 register, the Hearing Officer notes that the Grievant has established a prima facie case for violations of Article XI, Section 5 of the Michigan Constitution and Rule 1.2 of the Rules of the Civil Service Commission (nondiscrimination). The Hearing Officer notes that Grievant's Exhibit 4 (Amended Order of Judgment, February 3, 1976) expressly found the practices engaged in by the Special Investigation Unit violative of the United States Constitution and the Michigan Constitution. Further, in paragraph 3 and the closing paragraph of the Amended Order and Judgment the Court acknowledges that persons who may have been targets of the special unit investigations may well have suffered injury and damage as a result of the maintainence of files under the auspices of the unconstitutional Michigan Statutes (i.e., 1931 PA 328 and 1950 Ex Session PA 38, 39 and 40). Further, Mr. Will has demonstrated that the fact that the Special Investigation Unit maintained such a file on the Grievant's brother affected the selection process in which Grievant sought a promotional opportunity. Further, two of the witnesses, i.e., Ms. Martin and Mr. Riley, acknowl-

edged discussing the matter of the Grievant's brother's political activities as a possible factor to be considered in a security check of the Grievant. Moreover, on the face of the August 29, 1973 promotional register appears written notations which, absent any rebutta clearly shows that the Grievant's promotional opportunities were impacted by security considerations. The only security questions discussed during the hearing or advanced by either party was the question of the Grievant's brother's political activities.

In the face of this prima facie case of partisan considerations involved in the selection process which could have provided a promotional opportunity for the Grievant, the Department has offered little, if any, rebuttal. Not one of the three witnesses testifying other than the Grievant, was able to state that security considerations did not play a factor in the outcome of the decision on employee selection. Further, the record reflects that numerous efforts were taken to avoid appointing the Grievant to the Data Systems Analyst 11 position. For example, the first offer of the third vacancy went to a promotional register candidate below the Grievant. Also, ultimately, rather than appoint someone from the promotional register, a lateral transfer was utilized to fill the vacancy. It should be noted that the Department's witnesses testified that lateral transfers and promotional appointments were of equal standing and priority with regard to filling vacancies. Therefore, there was no obligation to laterally transfer employees before promoting an employee to fill the vacancy.

The Department's failure to rebut the prima facie case is further demonstrated by Mr. Riley's testimony to the effect that information on security checks and checks of intelligence records were normally conducted by phone. Any supervisor involved in the selection process could call



either the Personnel Office or the Special Investigation Unit and request information. The information then would be returned by phone. Matters were further complicated by Ms. Martin's testimony to the effect that she may or may not have received or transmitted information by phone regarding Mr. Will's brother's political activities in connection with the screening and selection process for the Data Systems Analyst 11 position.

The Hearing Officer notes the testimony of both Ms. Martin and Mr. Lipscomb to the effect that neither would be cajoed or badgered into failing to recommend a candidate because of political activities of a brother or similar security concerns. Further, the Hearing Officer notes that both Mr. Lipscomb and Ms. Martin provided substantial testimony on their consideration of the background, experience, and probability of success for Mr. Will in the Data Systems Analyst 11 position. Furthermore, the Hearing Officer notes and acknowledges the witnesses' concurrence that Mr. Will was not one of the exemplary candidates in the field. Nevertheless, this testimony was not coupled with clear and convincing statements, documents or evidence of any form or fashion discounting the Grievant's brother's political activities as a substantial factor in the decision to deny Mr. Will the promotional opportunity he sought.

Therefore, the Hearing Officer finds that Michigan Constitutional Article XI, Section 5 and Civil Service Rule 1.2 have been violated. Damages, in this case, would be the measure of the difference between the salary Mr. Will earned from the date of the appointment of the employee to the third Data Systems Analyst 11 vacancy and the salary M. Will would have earned had he been appointed to the Data Systems Analyst 11 position as of that date. The

assessment of these damages shall also be subject to the normal and regular mitigation principles involved, and Mr. Will shall not be entitled to damages for periods during which he was employed at a level equal to or higher than the Data Systems Analyst 11 position for which he applied during the summer of 1973.

**AWARD**

Grievance granted.

Samuel E. McCargo /s/
Hearing Officer



**CIVIL SERVICE COMMISSION**
**EMPLOYMENT RELATIONS BOARD**
**GEORGE E. GULLEN**
**AUBREY V. McCUTCHEON, Jr.**
**ROBERT D. BRENNER**

**STATE OF MICHIGAN**

**WILLIAM G. MILLIKEN, Governor**

**DEPARTMENT OF CIVIL SERVICE**
**Lewis Cass Building**
**320 S. Walnut Street, Box 30002**
**Lansing, Michigan 48909**

**RICHARD A. ROSS, State Personnel Director**

**MAILING DATE December 5, 1980**

**A BOARD DECISION**

RAY EUGENE WILL — ERB 80-114

and — HO 263-80

DEPARTMENT OF STATE POLICE

B – Appointment
3 – Personal Discimination

**MEMBERS PRESENT**

Mr. George E. Gullen, Jr., Chairperson
Mr. Aubrey V. McCutcheon, Jr., Member
Mr. Robert D. Brenner, Member

An appeal decided in conference by the Board on December 1, 1980 with the public and parties excused.

## DECISION

The Board considered the application for leave to appeal of the Department of State Police from the decision of the Hearing Officer.

Leave to appeal is denied because the Board is not persuaded that there is cause to review the Hearing Officer's award of salary differential between two 11 level classes for a period in late 1973.

This decision of the Board will be filed with the Commission and represent the final decision upon action by the Commission. You will be notified when the decision is final.



CIVIL SERVICE COMMISSION
EMPLOYMENT RELATIONS BOARD
GEORGE E. GULLEN
AUBREY V. McCUTCHEON, Jr.
ROBERT D. BRENNER

STATE OF MICHIGAN

WILLIAM G. MILLIKEN, Governor

DEPARTMENT OF CIVIL SERVICE
Lewis Cass Building
320 S. Walnut Street, Box 30002
Lansing, Michigan 48909

RICHARD A. ROSS, State Personnel Director

JAN 30 1981

## FINAL NOTICE

Mailing Date: JAN 30 1981

Mr. Michael J. Hodge
Assistant Attorney General
Executive Division
7th Floor, Law Building
525 West Ottawa Street
Lansing, MI 48913

ERB 80-114
HO 263-80

RE: Ray Eugene Will

and

Department of State Police

The Civil Service Commission has received and reviewed the decision of the Employment Relations Board in this

matter pursuant to Part 3, Section 1-304 of the Employee Relations Policy.

This notice from the Employment Relations Board is to inform relevant parties that the decision of the Employment Relations Board is *FINAL*.

Any question regarding this notice should be addressed to: Employment Relations Board, 320 S. Walnut Street, Box 30002, Lansing, Michigan 48909. Contact: John R. O'Connor (517) 373-9168.

cc: Captain R. T. Davis



STATE OF MICHIGAN

IN THE COURT OF CLAIMS

| | |
|---|---|
| Ray Eugene WILL<br>Plaintiff,<br>v<br>DEPARTMENT OF CIVIL SERVICE Michigan Department of State Police, State Personnel Director, Director of Michigan State Police,<br>Defendants. | File No. 6667<br>Consolidated with Ingham Circuit<br><br>Court File No. 78-21187-AA |

Lawrence J. Emery (P 23263)
Counsel for Plaintiff

George H. Weller (P 26249)
Counsel for Dept of State Police and Director, State Police

Robert S. Welliver (P 23084)
Counsel for Dept of Civil Service and State Personnel Director

HON. THOMAS L. BROWN (P 11303)

**ANSWER BY STATE POLICE AND DIRECTOR, STATE POLICE**

Defendants Michigan Department of State Police and Director of Michigan State Police, responding to plaintiff's complaint:

FIRST: Are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 1.

SECOND: Admit paragraph 2.

THIRD: Admit paragraph 3.

FOUTH: Admit paragraph 4.

FIFTH: Admit paragraph 5.

SIXTH: Are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 6.

SEVENTH: Are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 7.

EIGHTH: Are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 8.

NINTH: Are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 9.

TENTH: Admit the allegation in paragraph 10 that plaintiff sought to obtain employment in "said classification" of Data Systems Analyst II with the Michigan Department of State Police in August, 1973; and

are without knowledge or information sufficient to form a belief as to the truth of any other averments in paragraph 10.

ELEVENTH: Admit in relation to paragraph 11 that plaintiff was number 2 on the August 29, 1973 register.



TWELFTH: Admit paragraph 12.

THIRTEENTH: Are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 13.

FOURTEENTH: Admit paragraph 14, except for the word "political" which is denied, relying for support of such denial on the language of 1950 Ex Sess PA 38, 39, & 40.

FIFTEENTH: Admit the allegations in subparagraphs "c" and "e" in paragraph 15, and deny any other allegations in paragraph 15, relying for support of such denial on the "Act 40" file pertaining to Charles W. Will which plaintiff included as an exhibit in plaintiff's grievance file.

SIXTEENTH: Admit paragraph 16.

SEVENTEENTH: Admit paragraph 17.

EIGHTEENTH: Admit paragraph 18.

NINETEENTH: Admit paragraph 19.

TWENTIETH: Admit paragraph 20.

TWENTY-FIRST: Admit paragraph 21 only insofar as it pertains to the third vacancy for Administrative Analyst 11, and deny any other averment in paragraph 21, relying for support of such denial on the fact that the file had no relationship to the first two vacancies for Administrative Analyst 11.

TWENTY-SECOND: Deny paragraph 22, relying for support of such denial on the constraints set forth in 1950 PA Ex Sess 38, 39, & 40.

TWENTY-THIRD: Deny paragraph 23, relying for support of such denial on the constraints set forth in 1950 PA Ex Sess 38, 39, & 40.

TWENTY-FOURTH: Admit paragraph 24.

TWENTY-FIFTH: Admit paragraph 25.

TWENTY-SIXTH: Deny paragraph 26, relying for support of such denial on the language of 1950 Ex Sess PA 38, 39, & 40.

TWENTY-SEVENTH: Admit paragraph 27.

TWENTY-EIGHTH: Admit paragraph 28.

TWENTY-NINTH: Admit paragraph 29.

THIRTIETH: Admit paragraph 30.

THIRTY-FIRST: Defendants respond as set forth above.

THIRTY-SECOND: Deny paragraph 32, relying for support of such denial on the case of *Laird* v *Tatum*, 408 US 1 (1972), and other cases on the subject matter.

THIRTY-THIRD: Deny paragraph 33, relying for support of such denial on the fact that 42 USC §1983 is not applicable.

THIRTY-FOURTH: Defendants respond to paragraph 38 as set forth in the preceding paragraphs.

THIRTY-FIFTH: Deny paragraph 39, relying for support of such denial on the fact that plaintiff has not factu-



ally alleged, nor can he demonstrate, any "humiliation, ridicule, and embarrassment" caused by the conduct of the state police defendants.

THIRTY-SIXTH: Deny paragraph 40, relying for support of such denial on the fact that if there is any differential it is in an amount well below $10,000.

THIRTY-SEVENTH: Deny paragraph 41, relying for support of such denial on the fact that the allegations in paragraph 41 are duplicative of the allegations in paragraph 39.

THIRTY-EIGHTH: Deny paragraph 42, relying for support of such denial on the responses in the preceding paragraphs.

## AFFIRMATIVE DEFENSES

THIRTY-NINTH: The Court of Claims lacks jurisdiction of the subject matter, the state defendants not being subject to suit under 42 USC §1938.

FORTIETH: Even if a state is liable to suit under 42 USC §1983, it is immune from punitive and exemplary damages under 42 USC §1983.

FORTY-FIRST: If by some extreme interpretation it could be considered that the action against the "Director of Michigan State Police" is an action against an individual, then this Court of Claims lacks jurisdiction as actions in the Court of Claims may be had only against the State, not against individuals.

FORTY-SECOND: State police defendants are immune from liability because they were engaged in the exercise or discharge of a governmental function.

FORTY-THIRD: Judicial policy forestalls a double recovery for an injury.

WHEREFORE: State Police defendants pray that this court dismiss this action against them.

George H. Weller /s/
GEORGE H. WELLER (P 26249)
Assistant Attorney General
Counsel for "Michigan Department of State Police: and "Director of Michigan State Police."
793 Law Building
525 W. Ottawa
Lansing, Michigan 48913
(517) 373-8060

Dated: July 27, 1981



STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

| | |
|---|---|
| RAY EUGENE WILL,<br>Plaintiff,<br><br>v<br><br>DEPARTMENT OF CIVIL SERVICE, MICHIGAN DEPARTMENT OF STATE POLICE, STATE PERSONNEL DIRECTOR, DIRECTOR OF MICHIGAN STATE POLICE,<br>Defendants. | Circuit Ct.<br>No. 78-21187-AA<br><br>Consolidated with<br>Court of Claims<br>No. 78-6667 |

**OPINION OF THE COURT**

In these matters Plaintiff, Ray Eugene Will, seeks damages under 42 USC 1983, the United States Constitution and the state constitution for the use of a file maintained under 1950 PA Ex Sess 38, 39 and 40 on plaintiff's brother in a 1973 State Police employee promotion process. The maintenance of such files were found by this Court to be unconstitutional on February 5, 1976, in the case of *Human Rights Party* v *Department of State Police*, File No. 75-17499-AA, and the file on Plaintiff's brother was released.

Plaintiff's complaint alleges that in 1973 he sought a position as a Data Systems Analyst II with the Department of State Police. In 1977 Plaintiff discovered that the Department of State Police denied Plaintiff the opportunity for promotion based on information on Plaintiff's brother contained in a so-called red squad file.

Plaintiff filed an action in the circuit court after being informed by a hearing officer, as affirmed by the Civil Service Commission, that the grievance should have been filed in 1973. This Court granted the request of counsel for the Defendant, Department of the State Police, that a hearing before a Civil Service Hearing Officer be granted. The Court retained jurisdiction to review any appeal from the Civil Service Commission.

The Civil Service Commission affirmed the Hearing Officer's finding that the Department of State Police used "partisan considerations" of Plaintiff's brother's political activities in violation of the Michigan Constitution 1963, Art XI, §5 and the Civil Service Commission Rule 1.2. The Civil Service Commission also affirmed the measure of damages of $201.60 set by the Hearing Officer.

Plaintiff does not seek review of this decision but maintains that he is entitled to a summary judgment of liability against the State of Michigan, Department of State Police, and its Director, based on the adjudication of the Hearing Officer. Plaintiff maintains that this adjudication provides sufficient factual basis of a violation of Plaintiff's federal civil rights under the Civil Rights Act of 1871, 42 USC §1983.

The violation of state law by a state official of itself is insufficient to state a violation of a federal right. Section 1983 of the Civil Rights Act of 1871 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."



Under this section, liability is imposed on any "person" who deprives another person's federally protected rights. Such rights have been construed by the courts to include the protection of life, liberty and property under the Fourteenth Amendment of the Federal Constitution. It is Plaintiff's position that the Due Process Clause protects his property right as a public employee to fair treatment.

Plaintiff argues that the State having established a system of merit, [under Michigan Constitution 1963, Art 11, §5] the denial of plaintiff's promotion based on Plaintiff's brother's political persuasion violates due process. The Court agrees. It was expressed in *Perry* v *Sinderman*, 408 US 593, 601; 92 S Ct 2694; 33 L Ed 2d 570 (1972), that a "person's interest in a benefit is a 'property' interest for due process purposes if there are. . .rules or mutually explicit understandings that support his claim of entitlement to the benefit. . ." In this case there is no dispute that Plaintiff's competetive test scores ranked him as one of the top qualifiers on a merit basis for the position of Data Systems Analyst II. (Department of Civil Service Grievance Decision, dated June 10, 1980, p 3)

The issues presented before this Court are whether the state is a person within the meaning of §1983 and whether the 11th Amendment provides a bar to the award of damages out of a state treasury.

In both Circuit Court and the Court of Claims actions, Plaintiff seeks exemplary damages in addition to compensatory damages against the State of Michigan, Department

of State Police, and state officers in their official capacity. In these cases the State of Michigan is the real party.

The United States Supreme Court in *Monell* v *Department of Social Services of the City of New York*, 436 US 658; 98 S Ct 2018; 56 L Ed 2d 6 (1978), held that a municipality is a "person" under 42 USC §1983. However, whether state agencies and state officials are "persons" under §1983 has not been settled by the United States Supreme Court. The lower federal courts are divided on this issue.

This Court relies on the cases of *Marrapese* v *State of Rhode Island*, 500 F Supp 1207 (DRI 1980) and *Weisbord* v *Michigan State University*, 495 F Supp 1347 (WD Mich 1980). In *Marrapese*, *supra* at 1212, the court concludes that:

> ". . .the states are 'persons' potentially liable for constitutional deprivations inflicted through official custom and policy, but that, because Congress has not exercised its §5 powers to abrogate Eleventh Amendment immunity, each state must consent to the imposition of such liability. This interpretation allows victims of unconstitutional activity the largest possibility for redress, while exacting little cost in terms of federalism. Because there is no forced waiver, each state maintains ultimate control over its own potential liability. . . [footnote omitted] Moreover, this interpretation is consistent with earlier cases in which the Supreme Court seems to have assumed that a state could consent to §1983 liability. See, e.g., *Alabama* v *Pugh*, 438 U.S. 781, 782, 98 S.Ct. 3057, 3058, 57 L.Ed.2d 1114 (1978) (per curiam); *Edelman* v *Jordan*, 415 U.S. at 671-74, 94 S.Ct. at 1358-1359. Therefore, this Court holds that Rhode Island is a "person" within the meaning of §1983."



In *Weisbord*, *supra*, the court held that Michigan State University is a "person" under the terms of §1983. In his opinion Judge Gibson stated:

> "While the Supreme Court was not faced with the issue of whether agencies of a state are "persons," the legislative history and the rationale of that opinion is highly persuasive as to state agencies as well. This Court is of the opinion that these defendants are "persons" within the meaning of 42 U.S.C. §1983. Plaintiff's §1983 claims, therefore, will not be dismissed on this basis."

Having determined that the Michigan Department of State Police and its Director, in his official capacity, are "persons" under 42 USC §1983, this Court will address the issue of whether the 11th Amendment of the United States Constitution bars an award of monetary relief against state agencies.

The recent United States Supreme Court decisions hold that under the 11th Amendment federal courts lack jurisdiction over states or their agents in their official capacity. *Alabama* v *Pugh*, 438 US 781; 98 SCt 3057; 57 L Ed 2d 522 (1978); *Edelman* v *Jordan*, 415 US 651; 94 S Ct 1347; 39 L Ed 2d 662 (1974); *Quern* v *Jordan*, 440 US 332; 59 L Ed 2d 358; 99 S Ct 1139 (1979), reaffirms the holding in *Edelman*, *supra*, that §1983 does not abrogate the immunity of the states under the 11th Amendment. The court in *Edelman* held that a "retroactive award which requires payment of funds from the state treasury" violates the 11th Amendment.

The 11th Amendment states:

> "The Judicial power of the United States shall not be

> construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

This amendment guarantees immunity to the states from suit in the federal courts. It has been recognized that a state's consent to be sued in its own court does not necessarily imply consent to be sued in federal courts. As pointed out by Defendants, without the consent of the State, the State cannot be sued under a federal law in a state court if it cannot be sued under the same federal law in a federal court. In *Marrapese* the Court found that a suit may be maintained against the State of Rhode Island because it waived its immunity from suit. In reaching that conclusion the court quoted the standard of *Johnson* v *Zerbst*, 304 US 458, 464, 58 S Ct 1019; 82 L Ed 1461 (1938), that there must be an "intentional relinquishment or abandonment of a known right or privilege."

Implicit in the creation of the Court of Claims under MCLA 600.6404; MSA 27A.6404, "[t]o hear and determine any claims or demands based on 'ex contractu or delicto'" MCLA 600.6419; MSA 27A.6419 is a waiver of the Eleventh Amendment rights. However, the court in *Brown Brothers Equipment Co* v *State of Michigan*, 266 F Supp 506 (DC 1967), stated that the Michigan Court of Claims Act, MCLA 600.6401 *et seq;* MSA 27A. 6401 *et seq*, did not constitute a consent to a suit against the state by a private citizen in federal courts. This Court, therefore, concludes that nothing less than an express waiver of the 11th Amendment rights is necessary for the state to consent to be sued in the federal court, and thus in the state court. In the Court of Claims Act, the State of Michigan waives its sovereign immunity from suits in its own courts, not in the federal courts. Thus, as expressed in *Brody* v *Leamy*, 90 M2d 1;



393 NYS2d 243, 262 (Dutchess Cty 1977), cited by Defendants:

> "By virtue of the Eleventh Amendment no cause of action exists in any court of this state. This is so because by a parity of reasoning, while the Eleventh Amendment in itself is not applicable in state courts, since no federal cause of action could exist in federal court, none can be brought in state court."

This Court, therefore, concludes that Plaintiff's cause of action against the Defendant, Michigan Department of State Police and its Director in his official capacity under 42 USC §1983 in the circuit court action should be dismissed. However, this Court is of the opinion that by the general provision "[t]o hear and determine any claims or demands" based on "ex contractu or ex delicto," MCLA 600.6419; MSA 27A.6419, the State of Michigan consented to be sued in the Court of Claims on an action under 42 USC §1983. [The Court of Claims has exclusive jurisdiction over money damages against state agencies and state officers acting within their official capacity. *Paquin* v *Northern Michigan University*, 79 Mich App 605, 607; 262 NW2d 672 (1977)] Therefore, the Court grants Plaintiff's motion for summary judgment under his Court of Claims action against Defendants, Michigan Department of State Police and its director, on the issue of liability. Plaintiff may present proofs on the issue of damages in this matter.

An order may enter consistent with this opinion.

Thomas L. Brown /s/
THOMAS L. BROWN, CIRCUIT
JUDGE and COURT OF CLAIMS

DATED: November 15th, 1982.

A TRUE COPY—CLERK OF THE COURT
30th JUDICIAL CIRCUIT COURT

FILED—JAN. 3, 1983—BY gg CLERK

STATE OF MICHIGAN

COURT OF CLAIMS

| | |
|---|---|
| Ray Eugene WILL<br>Plaintiff,<br>v<br>DEPARTMENT OF CIVIL SERVICE, Michigan Department of State Police, State Personnel Director, Director of Michigan State Police,<br>Defendants. | No. 78-6667 |

**JUDGMENT**

At a session of the Court held at City Hall, Lansing, Michigan, on Dec. 30th, 1982.

PRESENT: HONORABLE THOMAS L. BROWN (P 11303) JUDGE OF THE THIRTIETH JUDICIAL CIRCUIT

Plaintiff having moved on June 15, 1981 for Summary Judgment in his favor because, except as to the amount of damages, there is no genuine issue as to any material fact and he is therefore entitled to judgment as a matter of law; and

The Court having considered the materials submitted by the parties, having heard oral argument, and being fully advised in the premises; and



It appearing to the Court that there is no genuine issue as to any material fact and the plaintiff is therefore entitled to judgment as a matter of law:

IT IS ORDERED that, for reasons given in the Court's Opinion of November 15, 1982, Judgment be, and it hereby is, entered in favor of plaintiff, except as to the amount of damages; and

IT IS ORDERED that the Department of Civil Service and State Personnel Director are dismissed as defendants.

Thomas L. Brown /s/
JUDGE OF THE THIRTIETH
JUDICIAL CIRCUIT

Countersigned:
Grace E. Gott /s/
Clerk, Court of Claims

NOTICE OF ENTRY OF ORDER WAIVED:

LICK, EMERY AND DEVINE
Counsel for plaintiff

By: Lawrence J. Emery /s/
LAWRENCE J. EMERY (P 23263)
A member of the firm
310 Business and Trade Center
200 Washington Square North
Lansing, Michigan 48933
(517) 482-0222

Dated: Dec. 29, 1982

NOTICE OF ENTRY OF ORDER WAIVED:

George H. Weller /s/
GEORGE H. WELLER (P 26249)
Assistant Attorney General
Counsel for defendants
Michigan Department of State Police
and Director of Michigan State Police
793 Law Building
525 W. Ottawa
Lansing, Michigan 49813

Dated: December 29, 1982

NOTICE OF ENTRY OF ORDER WAIVED:

Robert S. Welliver /s/
ROBERT S. WELLIVER (P 23084)
Assistant Attorney General
Counsel for defendants
Department of Civil Service
and State Personnel Director
Plaza One Building, Suite 3
Lansing, Michigan 48913
(517) 373-1162

Dated: December 30, 1982



STATE OF MICHIGAN
COURT OF CLAIMS
Case No. 6667

RAY EUGENE WILL,

*Plaintiff*,

—v.—

DEPARTMENT OF CIVIL SERVICES,

*Defendant*.

PROCEEDINGS had and testimony taken in the above-entitled cause before the HONORABLE THOMAS L. BROWN, Circuit Judge, on the 8th day of March, 1983, at Lansing, Michigan.

APPEARANCES:

LAWRENCE J. EMERY, ESQ.,
Attorney at Law,

Appearing on behalf of the Plaintiff;

GEORGE H. WELLER, ESQ.,
Assistant Attorney General,
State of Michigan

Appearing on behalf of the Defendant.

ALFRED G. JOHNSON, CSR-284
Official Court Reporter
Thirtieth Judicial Circuit
Ingham County, Michigan

THE COURT: Well, the Court in a bench trial is in a little bit different position than a jury determining damages in a jury room.

The Court's obligated as counsel knows to place its reasons, its finding of fact and conclusions of law on the record.

It's obvious to the Court that Mr. Will applied to this opportunity with the State Police in 1973, that the State Police had knowledge of the activities of the brother. The record is clear that the State Police used that knowledge. It's not clear that that prevented Mr. Will from receiving employment opportunity, but it is clear that it could have. It was a very distinct possibility.

And, Mr. Will accordingly has a justifiable grievance. It is a matter which the State Police should not have used in any fashion, should not have been aware of, should not have been in possession of, should not have used, even the—the barest innuendo should not affect Mr. Will's opportunity for employment, because what was the—we have Mr. Will who is, as far as the Court is able to determine, a conservative political individual. And, no one is claiming that he is the right of Mr.—to the right of Mr. Buckley. But, he is at least in that spectrum of the political scale.

And, his brother apparently is not on the spectrum. That is his brother's choice. That is Mr. Will's choice, a choice which persons in this country are free to make.

The courts and governments are not permitted, pursuant to our Constitution and our way of life, to indulge in determining someone's worth or value simply because of their political beliefs. And, we have other reasons the ones who—the work habits, if you will, as Mr. Weller has pointed out, whether one of—one is personality, one is ability, one is attainment, serious education; those are the important matters, not whether one believes in the Vietnam War, or is a political activist.

I suppose everyone due to the Red Squad era that was opposed to the Vietnam War was branded a Communist, or a Communist sympathizer or a pink coat, or something of that nature.

I read, as Mr. Weller pointed out, a good many of those Red Squad files, ones that because of the case I had here that were sent here by the State Police pursuant to the Court's order and the inquiry of persons who were interested, and also—it was apparent that there was a scare at that time, that the Communist



scare, if you will, and the government thought there was a legitimate reason for monitoring the activities of the individuals who were interested in being opposed to what the majority of the people were in favor of, if you will, through their elected representatives and so on and so forth.

And so they gathered information. That information they gathered boggled the minds.

I was in the Red Squad files, for example. The Red Squad files revealed that I was at a union Baptist Church on a certain date speaking in favor of open housing and that—and that along with Representative Lyons, with these individuals from that point to the Capitol Building. I guess that made me a Communist by virtue of that fact that I was in favor of open housing.

It really boggled the mind why the State Police would be interested in that particular gathering which was peaceful in all—for all intents and purposes. I was sent there as an emissary of Governor Romney, who asked me from the Governor's Office to attend that meeting. It was in my district. Why the State Police had an interest in monitoring activities of myself, Representative William Ryan, I don't—I fail to see. I fail to see. I don't know what that had any—I didn't know it until later, and I have no way of knowing whether it had any effect on my life at that time, whether it was the State Police because of that, or other persons who monitored my activities further, I have no way of knowing.

But, that one incident is enough to convince me that the pursuit was irrational. It was based upon no standards; simply done. No—no one can blame the State Police. It was simply done because the law was—law was ridiculous—ridiculous, and stupid in its whole purpose. Very little, or little purpose.

Now, I would have to say honestly that some of the persons monitored were dangerous individuals. Quite obviously from the reports that we received. There were groups known as Black Panthers. There were other groups, groups like the Weathermen, groups like that that did pose a threat, I think, from what I was able to develop from reading the files, who threatened the government, and was a threat to our security. And so the State Police had some interest in it, the FBI, and other individuals, in

monitoring the activities of persons such as that who were making bombs and distributing information how to make bombs, and things of this sort, and how to disrupt, and so on and so forth.

So there was some legitimacy to the activities. But, I think the law was ridiculous to the extent that it was—there was a standard to what the State Police were to do. So, to a great extent they are not to be blamed for what went on. They were simply, if you will, carrying out orders. But, so was Eichmann, and others merely carrying out orders.

So, there's no question that Mr. Will's life was disrupted. We will never know whether he would have made it as a—as a data processing analyst, analyzer or whatever, with the State Police, or that position he would have sought would have even been offered him absent that information. There's no way of knowing. The only thing we can assume is that the information was improper, inappropriate and he didn't get the job. So, there is every reason to believe that it entered into the State Police's consideration. As Mr. Weller said, it was the State Police who are security conscious, and they should be. They shouldn't be hiring persons who are going to divulge the information they have in their files. They are going to be very circumspect about the way they handle their job in sensitive matters. Certainly they should be interested in—in security when you hire someone. And I think that's—that reason gives us every reason to believe, or that attainment by the State Police gives us every reason to believe that simply they rejected Mr. Will because of this brother's activities, and for no other reasons.

So, the Court is clearly convinced that he was denied the possibility, which is the only thing we really have to deal with. We can't—we determine damages. That's the best you can do. You can only arrive at some—some conclusion by applying information in the best way possible in respect to the evidence as the Court has received it.

This knowledge that they had was a detriment to Mr. Will. This knowledge they had was available to them because of the state's activities in passing the law, in fomenting the state police to gather the information which they used.



Now, Mr. Weller points out Governor Williams, a known very liberal-minded individual, at least until he became a Supreme Court Justice—I'm not sure if his liberal trend is—what it is today. He seems to have become more conservative. But, the record just reflects that Governor Williams at that time was known by most people to be a fairly liberal individual. And if Mr. Weller is correct, and I assume that he wouldn't make that statement unless he felt there would be some good belief and knowledge and information, Governor Williams was the force behind the drafting and the passing of the so-called Red Squad legislation, subversive activities legislation. And there must have been a scare. There must have been some good and cogent reason for doing it. The State did it, and it turns out they—it was incorrect. They should have had better standards. The legislation should have been more precise, or the State Police should have been—said "Well, look, we got this legislation. We've got this duty to perform. Let's see if we can't perform it in some responsible fashion. Let's not sally-forth and depend on ambiguous language to give us immunity forever."

They could have developed standards like "Look, we will only investigate standards of those organizations which are interested in disrupting the constitution authority. We are not interested in persons who are protesting, persons who are marching in favor of good things like open housing, persons who are interested in questioning the Government implications and involvement in Vietnam, and things of that sort."

It turned out we shouldn't ever have been in Vietnam. It turns out that open housing was a good idea. So, the State Police, they didn't develop the standards. They just simply blindly followed the law, and so they are at fault.

The State is at fault for having passed it. So, we have state action involved. We have the state involved in being unfair to an individual in our society.

Now, Mr. Will indicated that once he found this out, once it was revealed to him that his brother was in the Red Squad files, and in that file was an indication that that knowledge was a consideration taken into account by the State Police when he arrived for employment, that he became distressed. He didn't believe it. He said he was very mad. He was disgusted. He is still

disgusted. And, quite frankly, I would be disgusted, too, if that was a reason for—the only reason, apparent reason for denial of employment opportunity.

He filed a grievance, as he indicated. He indicated that he—and the proofs are not to the contrary, he indicated that he desired this employment with the State Police, challenging—it appeared to be a challenging job, appeared to be of great interest. The State Police is a stable employer and so on and so forth. Many reasons for wanting to apply and obtain the opportunity.

His wife testified that he has changed since the revelation of the information. She remembers when he applied for the opportunity and his reactions at that time was along the lines that they—the employer, the employer State Police, whoever—whoever interviewed him was just going through the paces. And later he found out, when he found out about the Red Squad matter, he became—it became clear to him that they were doing—performing here simply because he had applied. And, he was qualified, and a—and they had to do it. They hushed up the information, the background information.

She indicated that he, since that time, his personality has changed to some extent. He has become snappy. I guess that is short of temper, if I understand the term correctly; not as patient as one perhaps should be. Less willing to go with the punches, if you will. Different than his normal patient attitude. That he is losing sleep since this time. That fellow employees seem to sense he's commenced this grievance procedure and this lawsuit. That the fellow employees have lost interest in being acquainted with him, or being in company with him.

Mr. Weller presented certain witnesses to us which would indicate, and it is the Court's opinion that there was never reason to believe that Mr. Will did lose an employment opportunity. It is indicated here he was—he was average employee. He did not show promise. But, I haven't heard anything presented here that the State Police job required anything other than the average employee of normal promise. It appears that the—appears that he qualifies for that employment. And the fact that he is an average employee of normal promise, that's not a way contra to his ability to obtaining employment.



There's some indication that his personal habits, work habits, doesn't get things done on time—I guess I could be accused of that. It all depends on how much work one has to do. There is no indication that he is lazy or doesn't—doesn't appear at work, or misses a lot of work, or is constantly absent, takes more vacations that he should, and things of that sort. From all I know he is a good employee.

Mr. Heilman testified here. He says that he recommends him with potential of performing at a higher level. His major areas of expertise is financial accounting, and his capacity to be a valuable employee.

Now, maybe Mr. Heilman regrets that he's written a letter of recommendation. I don't know. He didn't say that he did. But, that is what he said. If he didn't mean it he ought to tell us. Apparently he meant it.

Mr. Storie indicated that he had on one occasion threatened to fire Mr. Will, but that was—that was a long time ago. He was a lot younger.

The Court feels in the matter of damages, I am not going to set forth these damages separately, gentlemen, so that if you desire to appeal the Court's judgment in the matter, you can, of course. You may do that. Set that up separately any way you wish.

As to the wage loss, a small amount, somewhat more than what has been awarded to Mr. Will up to this point. But, the indications are that he—the indications are that if it has benefit it has every possibility, if it is proper, and the Court awards him his request of $584.64 for lost wages.

The transportation item, the Court awards nothing for that. Mr. Will could have lived anyplace. It's very difficult to posture damages based upon where one lives, especially as a minor matter of only four miles. So that's diminimous, really.

The Court denies any damages for transportation.

The income taxes, as Mr. Weller points out, the state government is located in the city of Lansing, and frequently persons are transported, and are transferred, and whatever, into the city of Lansing. And, you end up working here anyway. No matter where they are. I know there are some in Windsor Township, and Eaton County now. But, there is every indication they are

going to move them back into Lansing. I don't know. You can't really tell what the Legislature will decide to do. Any day they may change their mind. And, if the representatives take a fancy, they can move everybody back into Lansing. So, the State Police could be back in here, and they could all be paying income tax. So, the Court rejects the claim for income tax.

The Court does award to Mr. Will, for career loss, and this is an amount of money adjusted to present value, of $40,544.

And, the Court does award Mr. Will for emotional distress—let me get the figures, and this is a sum reduced to present value, $56,052.

And, the Court does award to him separately, as a separate item for exemplary damages, the equal sum of $56,052. That is the sum reduced to present value.

All right. Judgment may enter for the amounts indicated. That way, if the Court is wrong in awarding exemplary damages, I am sure that the State of Michigan, Supreme Court or whatever, or the Sixth Circuit Court of Appeals, federal, will tell me.

But, at least they are set forth separately, Mr. Weller, so that you can bring up that particular matter by separate brush. All right.

MR. EMERY: Thank you, your Honor.

THE COURT: Anything else, Mr. Emery?

MR. EMERY: Nothing. I do have a petition for attorney fees, but I don't think it's appropriate at this time to, since it's not going to—

THE COURT: Yes. Yes. Take up that—take that up with the taxed costs.

MR. EMERY: Thank you, your Honor.

THE COURT: Will you prepare the order, then, Mr. Emery?

MR. EMERY: Yes. I will prepare the judgment. Yes, your Honor.

THE COURT: All right. And you want me to keep the exhibits?

MR. EMERY: Yes, your Honor.

THE COURT: So that I have all of them? I have A from Mr. Weller, and 1, 2, 3 from Mr. Emery.

MR. EMERY: That is correct, your Honor.



THE COURT: That's it. All right. Thank you, gentlemen.

MR. EMERY: Thank you, your Honor.

(Whereupon, at or about 12:10 o'clock in the afternoon, court was in recess.)

FILED—NOV 2 1983

COURT OF CLAIMS—BY GG CLERK

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

| | |
|---|---|
| Ray Eugene WILL,<br>Plaintiff,<br>v.<br>DEPARTMENT OF CIVIL SERVICE, and State Personnel Director,<br>(dismissed) Defendants,<br>and<br>Michigan Department of State Police, and Director of Michigan State Police,<br>(remaining) Defendants. | No. 6667 |

**FINAL JUDGMENT**
**AS TO THE AMOUNT OF DAMAGES**

At a session of the Court held at the City Hall, Lansing, Michigan on October 25, 1983.

PRESENT: HONORABLE THOMAS L. BROWN
(P 11303) JUDGE OF THE THIRTIETH
JUDICIAL CIRCUIT

The Court having entered Judgment in favor of plaintiff on December 30, 1982, except as to the amount of damages, for the reasons given in the Court's Opinion of November 15, 1982: and



The Court having on March 8, 1983 tried on the facts the matter of damages and having on the record from the bench found the facts specially and stated separately its conclusions of law:

IT IS ORDERED AND ADJUDGED that the plaintiff recover from the remaining defendants the following sum as and for damages, which represents the present value of the damages incurred, together with costs to be taxed:

| | | |
|---|---|---|
| 1. | Wage Loss | $ 584.64 |
| 2. | Loss of career opportunities | $40,544.00 |
| 3. | Emotional distress and mental anxiety | $56,052.00 |
| 4. | Exemplary damages | $56,052.00 |
| 5. | Transportation costs | nothing |
| 6. | City of Lansing Income Tax Differential | nothing |

THOMAS L. BROWN /s/
JUDGE OF THE THIRTIETH
JUDICIAL CIRCUIT

Countersigned:

GRACE E. GOFF /s/
Deputy Clerk, Court of Claims